PP

v.

MOHAN SINGH LACHMAN SINGH

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB PATAIL J
[CRIMINAL TRIAL NO: 45-46-98]
16 APRIL 1999

CRIMINAL PROCEDURE: *Prosecution - Close of prosecution - Prima facie case - Standard of proof required of prosecution - Meaning of 'prima facie' - Criminal Procedure Code, s. 180(i) - Connexion between 'beyond reasonable doubt' and 'prima facie' - Standard of evaluation to be applied to prosecution's evidence*

CRIMINAL PROCEDURE: *Trial - Prima facie case - Standard of proof required of prosecution - Connexion between 'beyond reasonable doubt' and 'prima facie' - Standard of evaluation to be applied to prosecution's evidence - Criminal Procedure Code, s. 180(i)*

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking - Presumption of - Meaning of exclusive possession - Whether element of possession established*

The accused had two charges preferred against him under s. 39B(1)(a) of the Dangerous Drugs Act 1952. According to the facts, packages of suspected drugs were found in the room rented by the accused. The packages were sent to a chemist who confirmed the presence of heroin and cannabis as per the respective charges.

The issues for consideration were: (a) whether the prosecution had made out a *prima facie* case; (b) whether the evidence of the chemist as to the weight of the dangerous drugs could be accepted; and (c) whether the element of 'possession' had been established.

Held:

[1] The term *'prima facie'* is not descriptive of any standard of proof, and its effect is as a designative label indicating the case proved as at the close of the prosecution's case.

[1a] To establish a *prima facie* case, the prosecution must establish by evidence all the elements of the charge. If any one of the elements of the charge is not shown to exist, a *prima facie* case cannot be made

out, and the charge will not survive. The evidence relied upon to establish the elements must be sufficient for the accused to be lawfully convicted.

[2] The prosecution therefore has to be in a position to say that at the end of its case, on the basis of the evidence it has advanced, and tested by cross-examination, it has advanced evidence beyond a reasonable doubt in respect of all the elements of the charge; and at the end of the trial, based upon an evaluation of the whole of the evidence, that the defence has not raised any reasonable doubt by the evidence that the latter has adduced.

[3] Bearing in mind that in the event of ambiguity the beneficial interpretation is given in favour of the accused, the 'beyond reasonable doubt' test is therefore applied in assessing the evidence for the purpose of determining whether the prosecution has made out a *prima facie* case. It goes without saying that an evaluation of whether the prosecution has discharged the burden of proof beyond a reasonable doubt requires a full or maximum evaluation of the evidence in the sense of evaluating the evidence before the court thoroughly.

[4] On the facts, the evidence of the chemist was not challenged on both charges. His testimony was not shaken and his answers therefore were accepted for the purpose of deciding whether the prosecution had made out a *prima facie* case.

[4a] The accused was the exclusive occupier of the room and therefore must have had knowledge of the items in his room. Considering that no other person had access to the premises, the evidence irresistibly suggested that the accused not only brought the items into the room but that he also had custody, control and knowledge and therefore was in possession of the dangerous drugs found in the room – which he was re-packing in small quantities for giving or selling to other persons. The prosecution therefore had made out a *prima facie* case.

[5] The accused suggested that the evidence had been planted by the police. However, the failure to explain why the police might want to do so must keep this suggestion in the realms of fancy – and so improbable that it could not be believed and did not raise any reasonable doubt. The prosecution therefore had proved its case beyond a reasonable doubt.

[Accused convicted and sentenced to death.]

Case(s) referred to:

Abdullah Zawawi Yusoff v. PP [1993] 4 CLJ 1 ***(refd)***
Arulpragasan Sundaraju [1996] 4 CLJ 597 ***(refd)***
Cohen Lorraine Philis & Anor v. PP & Another Appeal [1989] 2 CLJ 956 ***(refd)***
Dalip Bhagwan Singh v. PP [1997] 4 CLJ 645 ***(refd)***
Haw Tua Tau v. PP [1981] 1 CLJ 123 ***(refd)***
Khoo Hi Chiang v. PP [1994] 2 CLJ 151 ***(refd)***
Koh Chai Cheng v. PP [1981] 1 MLJ 64 ***(refd)***
Leong Bon Huat v. PP [1993] 3 CLJ 603 ***(dist)***
Lt Kol Yusof Abdul Rahman v. Kol Anuar Md A Amin & Anor [1997] 2 CLJ 752 ***(refd)***
Miller v. Minister of Pensions [1947] 2 All ER 372 ***(refd)***
Munusamy v. PP [1987] 1 MLJ 492 ***(foll)***
PP v. Ang Soon Huat [1991] 1 MLJ 1 ***(cit)***
PP v. Chong Wei Kian [1990] 2 CLJ 435 ***(cit)***
PP v. Norzilan Yaacob & Anor [1989] 1 CLJ 466 ***(dist)***
PP v. Ong Cheng Heong [1998] 4 CLJ 209 ***(foll)***
*PP v. Saad Mat Takraw & Anor [1998] 3 CLJ 380 (****(foll)***
PP v. Teh Eng Wah FTCT 45-38-98 ***(refd)***
Saminathan & Ors v. PP [1955] 21 MLJ 121 ***(refd)***
Tan Boon Kean v. PP [1995] 4 CLJ 456 ***(foll)***

Legislation referred to:

Armed Forces (Court Martial) Rules of Procedure 1976, r. 74(1)
Criminal Procedure Code, ss. 180(i), (iii), 182A(iii), 277
Dangerous Drugs Act 1952, ss. 2, 37(b), (da)(iiia), (da)(vi), (da)(vii), (da)(viii), (g), (j), 39B(1)(a), (2)

Other source(s) referred to:

Concise Oxford Dictionary

For the PP - Kamarulzaman Abd Jalil DPP
For the accused - Karpal Singh; M/s Karpal Singh & Co

[Editor's note: For a recent decision on 'prima facie case' and s. 180 of the Criminal Procedure Code please see also PP v. Sukumaran Sundram [1999] 4 CLJ 242.]

Reported by Mariette Peters-Goh

JUDGMENT

Abdul Wahab Patail J:

The Charges

Two charges were preferred against the accused, Mohan Singh a/l Lachman Singh, under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (DDA) as follows:

1st Charge

Bahawa kamu pada 3 September 1997 jam lebih kurang 6:00 petang di rumah No. 2-1B, Jalan Gandek, off Jalan Sg. Besi, dalam Bandaraya Kuala Lumpur, di dalam Wilayah Persekutuan, telah mengedar dadah berbahaya iaitu campuran heroin dan monoacetylmorphines seberat 104.16 gram iaitu heroin seberat 52.29 gram dan mono-acetylmorphines seberat 51.87 gram dan oleh yang demikian, kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan kamu boleh dihukum di bawah seksyen 39B(2) di bawah Akta yang sama.

2nd Charge

Bahawa kamu pada 3 September 1997 jam lebih kurang 6.00 petang di rumah No. 2-IB, Jalan Gandek, off Jalan Sg. Besi, dalam Bandaraya Kuala Lumpur, di dalam Wilayah Persekutuan, telah mengedar dadah berbahaya iaitu cannabis seberat 335.1 gram dan oleh yang demikian, kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) di bawah Akta yang sama.

Having considered the undesirability of trying two capital charges together, the court allowed the uncontested application for the two capital charges to be tried together for the reason that the two charges involve the same incident, being on the same date, in the same place, the same witnesses and accused, and in the course of the same search in respect of the accused.

The Prosecution Evidence

C/lnsp. Kamaruddin bin Ismail (SP7) gave evidence that on 3 September 1997 at about 5.30pm he led a party comprising C/lnsp. Mohd. Adnan bin Haji Ujang; Insp. Roslan bin Hussin; Insp. Som Chai a/l Din Lian; Sjn. Mohd. Salleh bin Ahmad; D/Sjn Ruslan bin Hj. Jaafar; D/Sjn Lim Piew Weng; D/Sjn Mohd. Zaman bin Yunus (SP9); D/Kpl Mohamed bin Mohamud; D/Kpl Mohd. Akhir bin Abdullah; D/Kpl Mansor bin Hj. Din; D/Kpl Haridan bin Ab. Hamid; Kpl Juwahir bin Supar; D/Kpl Hassan bin Ismail; Kpl Romli bin Hashim; L/Kpl. Mastoroh bin Mohamed; L/Kpl. Sham bin Eusope; D/Kpl. Kamaruddin bin Alias; D/Kpl. Kanasamurthi a/l Subramaniam; L/Kpl. Rameshwaran a/l Raju (SP5); dan L/Kpl. Mohd Hariri bin Harun, had conducted a raid upon House 2-1F Jalan Gandek, off Jln. Sg. Besi, Kuala Lumpur. House 2-1F is on the 3rd floor of a four-storey shophouse.

In that raid, a male Indian, Kamalakaran a/l Sithamparam, was arrested in the living room of House 2-1F; and a male Chinese, Choo Nen Kim, and the accused, Mohan Singh a/l Lachman Singh were arrested in another room in House 2-1F. A body search conducted by L/Kpl. Rameshwaran a/l Raju found no drugs on the person of the accused. C/Insp. Kamaruddin (SP7) supported the evidence of L/Kpl. Rameshwaran (SP5) that the latter palming the waist

area of the accused and attempting to reach into the inner waist pocket, was resisted by the accused. L/Kpl. Rameshwaran (SP5) then grabbed at the pocket and pulled it out, with the result the pocket was torn out. Two keys were found in the inner waist pocket that was torn out.

After the two keys were found, the accused led D/Sjn Mohd. Zaman bin Yunus (SP9), C/Insp. Kamaruddin (SP7), Det. Kpl Kamaruddin bin Alias and L/Kpl. Rameshwaran (SP5) to House 2-1B on the first floor of the same building. Using one of the keys, SP7 was able to open padlock on the grille of the House 2-1B. They went into House 2-1B and went to the room marked 'B1' in exh. P5. Using the second key, they unlocked the padlock on the door and entered the room.

C/Insp. Kamaruddin (SP7) found in the room B1 as follows:

(1) In the middle of the room, on the floor, a pink coloured plastic bag inside which were five packages of tan coloured paper, inside of each package being one sealed plastic packet containing a pink coloured powdery and granular substance believed to be heroin.

(2) On the floor, alongside the wall and behind a mattress leaning upon the wall, a package wrapped in a piece of newspaper, inside which was found two bundles of 11 each sealed small plastic bags each containing a pink coloured powdery and granular substance believed to be heroin.

(3) Also found in the room was a weighing scale, and electronic weighing scale, a King Star brand sealer, scissors, knives, spoons, and empty unused new plastic bags on the floor about a foot from the pink coloured plastic bag above.

In addition C/Insp. Kamaruddin (SP7) received from D/Sjn. Mohd. Zaman (SP9) a black bag with the brand 'LICIANO' that the latter found behind a TV set on the floor. Inside the bag was found a compressed slab of plant material wrapped in plastic sheet and aluminium foil. The plant material was suspected to be cannabis.

All the three packages of suspected drugs were taken by C/Insp. Kamaruddin (SP7) to his office, and after affixing on the exhibits his signature, the date 3 September 1997 and lodging a police report, handed over the exhibits to Insp. Wan Roslan bin Ab. Rahman (SP3) on 4 September 1997 at 12.30am.

Insp. Wan Roslan (SP3) confirmed receiving the following exhibits from C/Insp. Kamaruddin (SP7):

Saya menerima 5 paket plastik besar berisi bahan disyaki heroin, 22 paket plastik kecil berisi bahan disyaki heroin, 1 ketul mampat disyaki ganja. Saya juga menerima 2 mangga, 1 beg plastik berwarna merah jambu, 1 beg hitam jenama 'LICIANO', 1 impulse-sealer jenama 'King Star', 1 alat penimbang jenama 'Standard', 1 alat penimbang elektronik jenama 'Tanita', 1 paket plastik-plastik kosong berukuran 5 cm. x 8 cm., 3 ikatan paket plastik plastik kecil, gelang getah, 2 bilah pisau 'blade', 2 gunting kecil, 2 sudu besar, 1 sudu plastik kecil, 1 kemeja lengan pendek jenama 'Party', dan sehelai seluar jeans jenama 'Levis' berwarna biru.

Insp. Wan Roslan (SP3) gave evidence that he directed D/Kpl Abdul Latif bin Ismail (SP2) on 4 September 1997 at 9pm to take photographs of the exhibits suspected to contain dangerous drugs. Insp. Wan Roslan (SP3) sent the packages to Supt. Ismail bin Abdul Rahman (SP4) for fingerprinting and received back the same from SP4 on 23 September 1997.

The three packages containing suspected drugs were sent by Insp. Wan Roslan (SP3) to the chemist, Cheong Meow Kioon @ Cheong Meow Koon (SP6) on 27 September 1997 at about 11.58am. Cheong Meow Kioon (SP6) confirmed receiving the same and confirmed the presence of 52.29gm heroin and 51.87gm monoacetylmorphines as in the first charge and 335.1gm cannabis as in the second charge.

Insp. Wan Roslan (SP3), Supt. Ismail (SP4) and Cheong Meow Kioon (SP6) all gave evidence the packages of suspected drugs were kept under lock and key under their sole custody when the exhibits were with them.

By virtue of s. 180(i) of the Criminal Procedure Code FMS Cap 6 (the Code) the court must decide at the close of the prosecution case whether the prosecution has made out a *prima facie* case. In so deciding it becomes necessary to consider the meaning of 'has made out' and 'a *prima facie* case'.

The usual term in law is 'has proved', but the term used in the existing s. 180 of the Code is 'has made out'. Amongst the meanings of 'make out' in the *Concise Oxford Dictionary* are:

1a. distinguish by sight or hearing,

b. decipher (handwriting etc)

2 understand,

3 assert; pretend; represent as; demonstrate, prove; try to prove; make progress; fare;

It is not necessary to proceed to the colloquial meanings of the term. Given the diverse meanings, the words 'made out' must be understood, in the context of 'when the case for the prosecution is concluded' as 'proved'.

The pre-amendment operative words of s. 180, 'a case which if unrebutted would warrant a conviction' was interpreted in *Arulpragasan a/l Sundaraju* [1996] 4 CLJ 597; [1997] 1 MLJ 1 FC to require proof beyond reasonable doubt. Subsequent to that case, the section was amended to 'has made out a *prima facie* case'. But the amendment did not make it clear whether a *prima facie* case requires proof beyond reasonable doubt or on a balance of probabilities. The term *prima facie* case is not itself clearly descriptive of any standard of proof in the sense of specifying proof beyond reasonable doubt or on a balance of probabilities.

What is then meant by a *prima facie* case? Literally, *prima facie* means "on the face of it" or if one were to quibble, 'primarily on the face of it'. Obviously, to establish a *prima facie* case, the prosecution must establish by evidence all the elements of the charge. If any of the elements of a charge are not shown to exist, a *prima facie* case cannot be made out, and the charge will not survive. The evidence relied upon to establish the elements must be sufficient for the accused to be lawfully convicted. The '*prima facie* case' test at the close of the prosecution case is best stated by Azmi FCJ in *Munusamy v. PP* [1987] 1 MLJ 492:

> On the assumption that the prosecution evidence was accurate, could the accused be lawfully convicted?

Peh Swee Chin FCJ in *Dalip Bhagwan Singh v. PP* [1998] 1 MLJ 1 FC; [1997] 4 CLJ 645 FC, in referring to the above passage when considering the meaning of a *prima facie* case and the term 'accurate', and said:

> It would not do any violence to the language to say that the word 'accurate' could mean 'true' in the above quotation. It would also not be off the mark to say the words 'prosecution evidence' in the same quotation refer to the evidence of 'primary facts' mentioned by Lord Diplock who held that the prosecution made out a case by adducing such evidence of primary facts in *Haw Tua Tau* (at p 51). Such evidence of primary facts could logically refer to evidence or evidence sufficient enough to prove each ingredient of an offence, such as death as one of the ingredients in a murder case. Once there is sufficiency of such evidence, so long as it is not inherently incredible such as the landing of a flying saucer from outer space on Dataran Merdeka in Kuala Lumpur, a *prima facie* case is made out. In concluding on the sufficiency of such evidence to satisfy the said ingredients, there will be sometimes a lot of rejection of irrelevant or inadmissible evidence.

This passage in *Dalip Bhagwan Singh v. PP* cannot simply be read as suggesting that so long as the evidence adduced is not inherently incredible, and there is some evidence adduced in respect of all of the elements of the charge, then a *prima facie* case is made out. That would ignore the qualification by Peh Swee Chin FCJ of 'evidence or evidence sufficient enough to prove each ingredient of an offence'. It is relevant at this stage to remember that in the first stage of a criminal trial, a charge is read and if the accused does not plead guilty, only prosecution witnesses are brought forward to give evidence. The role of the defence at this first stage is to cross-examine the prosecution witnesses,

a) to object to irrelevant, prejudicial and inadmissible evidence;

b) to test the credibility of the witnesses,

c) to expose discrepancies, inconsistencies, contradictions in the prosecution case, and

d) to lay out its defence during cross-examination to give credibility to it should the defence be called.

The consideration of the evidence must necessarily include an appreciation that:

a) the evidence is not so incredible, implausible or illogical that no reasonable person would accept it, and

b) the evidence is clear, precise, accurate and is given in such manner as not to negate the presumption his evidence is accurate or truthful.

The assumption that the prosecution evidence is accurate, or that it is not implausible or illogical can only be made if all of the evidence is consistent and not incredible, and the witness does not give his evidence in such manner as to manifest his unreliability. The conclusion there is a sufficiency of accurate evidence in respect of all the elements must include that there are no material gaps. If the evidence is not consistent, or there are gaps in the evidence, the making of the assumption the evidence is accurate or making a finding there is evidence sufficient enough to prove each element of an offence is impossible and indeed perverse.

The Court of Appeal in *Lt. Kol Yusof bin Abdul Rahman v. Kol Anuar bin Md A Amin & Anor* [1997] 2 CLJ 752; [1997] 1 MLJ 562 CA, considering '*prima facie* case' in r. 74(1) of the Armed Forces (Court Martial) Rules of Procedure 1976 held, distinguishing *Haw Tua Tau v. PP* [1981] 1 CLJ 123; [1981] 2 MLJ 49, and following *Khoo Hi Chiang v. PP* [1994] 2 CLJ 151; [1994] 1 MLJ 269 and *Arulpragasan a/l Sandaraju v. PP* [1996] 4 CLJ 597; [1997] 1 MLJ 1 that the degree of proof required to establish a *prima facie* case is proof beyond all reasonable doubt.

While the Court of Appeal did not refer to the case, it would have found support from *Tan Boon Kean v. PP* [1995] 4 CLJ 456; [1995] 3 MLJ 514 FC, where Azmi FCJ, in delivering the judgment of the Federal Court said:

> '*Prima facie*', means on the face of it or at first glance. So, 'a *prima facie* case' is a 'case which is sufficient to call for an answer. While *prima facie* evidence is evidence which is sufficient to establish a fact in the absence of any evidence to the contrary, but is not conclusive' (see the *Oxford Companion to Law* at p 987). '*Prima facie* evidence' is evidence where 'a party's evidence in support of any issue is so weighty that no reasonable man could help deciding the issue in his favour in the absence of further evidence' (see *Cross on Evidence* (2nd Ed) at pp. 24 and 25; and also per Wee Chong Jin CJ in *Gan Soo Swee & Anor v. Ramoo* [1969] 1 MLJ 59 at p 61). In our view, under s. 180, a *prima facie* case is one which is established by sufficient beyond reasonable doubt evidence and can be overthrown only by rebutting evidence adduced by the other side, so as to cast a reasonable doubt on the prosecution case as to the guilt of the accused.

The term *'prima facie'* was therefore used by Azmi FCJ in the sense of evidence on the basis of proof beyond reasonable doubt. This view is, to my mind, supported by the reality that after closing of its case under s. 180 of the Code, the prosecution adduces no further evidence, except in the rare cases of evidence limited for the purpose of rebuttal.

The other view appears equally disarming: that one cannot conclude a charge has been proven beyond reasonable doubt until one has heard all the evidence from both the prosecution and the defence. The finding at the end of the prosecution case is therefore whether the prosecution has made out a *prima facie* case. But as alluded to earlier in this part of this judgment, the term '*prima facie* case' is not descriptive of any standard of proof, and its effect is as a designative label indicating the case proved as at the close of the prosecution case.

It is interesting to note in passing, that while the accused may be called upon to enter on his defence under s. 180(iii) of the Code, there is nothing in the Code providing for the event that an accused upon being so called upon, does not adduce any evidence. If ss. 180 and 182A were read as to allow two different standards, it would mean the court, without hearing any further evidence, would have to re-consider the evidence of the prosecution again, this time subjecting it to a higher standard. If the test of 'proof beyond reasonable doubt' is applied in respect of a *prima facie* case, then the exercise of re-considering upon a higher standard is unnecessary.

Bearing in mind that the prosecution adduces no further evidence after closing its case to add to evidence already adduced, and that it would be odd, to say the least, if after a defence has been called under s. 180(iii) of the Code, the accused is later acquitted under s. 182A(iii) of the Code without any further evidence adduced by the accused, the evidence adduced by the end of the prosecution case must inevitably be which, for want of a better term, if not rebutted by the defence by other evidence, would be sufficient to warrant a conviction, ie as the term *prima facie* was used by Azmi FCJ in *Tan Boon Kean v. PP* quoted above:

> In our view, under s. 180, a *prima facie* case is one which is established by sufficient beyond reasonable doubt evidence and can be overthrown only by rebutting evidence adduced by the other side, so as to cast a reasonable doubt on the prosecution case as to the guilt of the accused.

It is difficult also to disagree with the argument that since the standard of proof in criminal cases is 'proof beyond reasonable doubt', it follows that such evidence, 'sufficient evidence' according to *Dalip Bhagwan Singh v. PP*, must be evidence sufficient to prove beyond reasonable doubt. Such an interpretation of s. 180 is not inconsistent with s. 182A. It simply means that once the prosecution establishes a *prima facie* case under s. 180 of the Code, the accused has a second opportunity to overcome the prosecution's case, this time by adducing evidence raising a reasonable doubt. It also accords with fundamental principle that such burden should not be visited upon a person unless there is evidence sufficient to convict him if he does not enter upon his defence.

I conclude then that the prosecution must be in a position to say

a) at the end of the prosecution case, that on the basis of the evidence it has advanced, and tested by cross-examination, it has advanced evidence beyond reasonable doubt in respect of all the elements of the charge; and

b) at the end of the trial, and based upon an evaluation of the whole of the evidence, that the defence has not raised any reasonable doubts by the evidence that the latter has adduced.

Keeping in mind that in the event of ambiguity the beneficial interpretation is given in favour of the accused, the 'beyond reasonable doubt' test is therefore applied in assessing the evidence for the purpose of determining whether the prosecution has made out a *prima facie* case. It goes without saying that an evaluation of whether the prosecution has discharged the burden of proof beyond reasonable doubt requires a full or maximum evaluation of the evidence in the sense of evaluating the evidence before the court thoroughly. In this respect I would agree with *PP v. Ong Cheng Heong* [1998] 4 CLJ 209; [1998] 6 MLJ 679.

The sole question at all these stages then, be it after hearing the evidence of the prosecution because of inconsistencies, contradictions or gaps in the prosecution evidence; or after hearing all of the evidence including that adduced on behalf of the accused, as to whether the evidence adduced by the accused raised any reasonable doubt, is what is a reasonable doubt.

What is proof beyond reasonable doubt has been set out in the judgment of Buhagiar J in *Saminathan & Ors v. PP* [1955] 21 MLJ 121, and quoted extensively in *Lt. Kol Yusof bin Abdul Rahman*. It is trite that proof beyond reasonable doubt does not require proof beyond a shadow of a doubt or fanciful doubts. What is a reasonable doubt has been admirably explained by Denning J in *Miller v. Minister of Pensions* [1947] 2 All ER 372, 373:

> ... need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice.

After referring to the above I had concluded in *PP v. Teh Eng Wah* FTCT 45-38-98 that:

> It would not do any violence to the above if the difference between 'fanciful' and 'reasonable' is viewed as whether the evidence is credible, probable, plausible or logical that a reasonable person, having regard to the ordinary course of nature or natural events, human conduct, and in the particular circumstances of the particular case, would accept it as to act upon it as having occurred or been proven to have occurred, or as truthful or accurate; and not a doubt that could, with the application of some ingenuity, be conjured up, envisioned or visualized.

Applying these standards, I turn to consider the evidence in this case.

Trafficking

The accused is charged in both cases with the offence of trafficking. A finding of trafficking may arise in two ways.

Firstly, trafficking is defined in s. 2 of the Dangerous Drugs Act 1952 (DDA) in the following terms:

> "trafficking" includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug;

Traffic in its ordinary meaning means to trade. Thus although the definition in s. 2 is in wide terms, it has been held in *Cohen Lorraine Philis & Anor v. Public Prosecutor and Another Appeal* [1989] 2 CLJ 956; [1989] 3 MLJ 286 SC that possession is, depending upon the circumstances of the case, available as an answer to a charge of trafficking. In that case the defence was allowed to an addict. In *Koh Chai Cheng v. Public Prosecutor* [1981] 1 MLJ 64 PC, the Privy Council held that the mere act of moving the drugs does not of itself amount to trafficking. Similarly then keeping, concealing, receiving, storing, administering, transporting, carrying, procuring for his own use cannot therefore be trafficking. It must involve an element of a business activity.

Secondly, given the alleged quantity of heroin (52.29gm), monoacetylmorphines (51.87gm) and cannabis (335.1gm), the prosecution may also rely on the presumptions of trafficking under s. 37(da)(iiia) and 37(da)(viii) of the DDA. In this regard the chemist's evidence is of special importance. I shall deal with this question later in this judgment.

Trafficking: Section 2 DDA

I now proceed to consider the facts in relation to the first alternative, that is, 'trafficking' under s. 2 DDA, which does not rely on any presumption.

As to the First Charge

Counsel raised the question in relation to the first charge that since the drugs concerned were found in two packages, the first being five sealed plastic packets of dangerous drugs in a pink plastic bag on the floor in the middle of the room while the second was found behind a mattress leaning against the wall and in the form of 22 small sealed plastic packets of dangerous drugs ties in two bundles and wrapped in a piece of newspaper, the drugs should be the subject of two charges.

In *PP v. Norzilan bin Yaacob & Anor* [1989] 1 CLJ 466; [1989] 1 MLJ 442 a similar question was addressed. In my view that case is distinguishable on the basis the drugs were found not in the same room but in different parts of the house to which areas different people may have different levels of access. The 1,513.21 gm of cannabis in that case was found in three locations in the middle room, two locations in the kitchen and three locations in the backyard buried in the ground and in a septic tank.

In this case all of the drugs were found in the same room. It was submitted the 22 small sealed packets contained 1.28 gm of heroin and 0.74 gm of monoacetylmorphines, and the presumption under s. 37(da)(iiia) would not be applicable, and at best it could sustain only a charge for possession, and should be dealt with separately. Given that the heroin and mono-acetylmorphines in

the five packets found in the pink plastic bag is well above 15 grams, it means little to the first charge, and if I agreed with the submission it would result in an additional charge against the accused.

In the circumstances I ruled that the charge is properly drafted.

The dangerous drugs in the first charge were found partly in five large sealed packets and partly in 22 small sealed packets, together with more unused plastic packets, a weighing scale and an electronic weighing scale, and an electric sealer to seal the plastic packets. The weighing scales, small plastic packets and sealer are equipment of re-packing tidily, and with the use of the electronic weighing scale to do so in small quantities. It is irresistible evidence, in the absence of any contrary evidence, of the activity of trading in the dangerous drug by selling and distributing in small packets consistent with the form consumers of the dangerous drug would purchase the same. There is therefore clear and irresistible evidence of trafficking in the said dangerous drugs by some person or persons as the term is defined in s. 2 of the DDA.

As to the Second Charge

The subject of the second charge, cannabis, was found wrapped in a plastic sheet and aluminium foil and placed in a black bag behind a TV set. According to the chemist the weight of cannabis was 335.1 grams.

The cannabis was packed in a compressed slab form. Although placed in a bag in a corner of the room behind a television set, its finding in a room where a large quantity of heroin is found together with all of the equipment for weighing accurately and packing neatly, leads equally irresistibly in the absence of any contrary evidence, to the conclusion that whoever were the person or persons involved, they were engaged in the activity of trafficking in the said dangerous drugs.

I have used the term 'in the absence of any contrary evidence' in relation to the conclusion made. The qualification, in the context that this is in the s. 180 part of the trial, simply means that there is no evidence from the prosecution witnesses, either in examination-in-chief, cross-examination or re-examination, that might suggest any other alternative conclusion. It is not meant to impose any onus of proof upon the accused to prove innocence.

Trafficking: Based On Presumption

In relation to the first charge, the chemist Cheong Meow Kioon (SP6) gave evidence that upon weighing, homogenizing and analyzing the pink granular and powdery substances in the five sealed packets and the light orange granular and powdery substance in the 22 small sealed packets he found them to contain

a total of 52.29gm heroin and 51.87gm mono-acetylmorphines as in the first charge. These amounts are well beyond the 15gm of heroin and/or monoacetylmorphines which would give rise under s. 37(da)(iiia) of the DDA that the person found in possession thereof is presumed, until the contrary is proved, to be trafficking in the said drug.

In relation to the second charge, the said chemist found after conducting visual, microscopic and chemical tests, that the compressed slab of plant material contained 335.1gm cannabis as defined in s. 2 of the Dangerous Drugs Act 1952. Possession of more than 200gm of cannabis and cannabis resin give rise, under s. 37(da)(vii) of the Dangerous Drugs Act 1952, to the presumption, until the contrary is proved, that the person so found in possession is trafficking in the said dangerous drug.

What the dangerous drugs were was not disputed. The only question is whether the evidence of the chemist as to the weights of the dangerous drugs can be accepted.

The Heroin And Mono-acetylmorphine Evidence

On the basis the expertise of Mr. Cheong Meow Kioon (SP6) as a chemist to analyse dangerous drugs was not challenged, the court accepts his opinion as that of an expert witness. Nevertheless the court must still consider and weigh his evidence as that of any other witness. His evidence was challenged on whether the chemist had used an adequate sample for the analysis. Reference was made by Mr. Gobind Singh to s. 37(j) of the DDA. The chemist had given that the pink granular and powdery substance in the five packets were separately made homogeneous, and in the case of the orange granular and powdery substance in 22 packets, he had put the substance together before blending to homogeneity and then testing the same. In answer to questions by the court, the witness explained how he had homogenized the substances.

The challenge to the evidence of the chemist was not followed up in submissions. His testimony was not shaken. His answers may therefore, for the purposes of a decision under s. 180, be taken as accepted. Questions in cross-examination, by themselves are not evidence, and serves only to lay out the line of defence at the first available opportunity so as to give weight to the defence as *bona fide*. The line must be maintained in submission if it is to be given further consideration. If not maintained in submissions, it may be taken that the line has been, at that stage, abandoned.

The Cannabis Evidence

The chemist had given evidence he had loosened the slab of cannabis, broken it up to smaller pieces so as to conduct 100% physical examination involving visual and microscopic examination. In this case, the amount of the cannabis found does not make the evidence of the chemist that he has examined 100% of the slab of cannabis, which had been broken up and loosened for the purpose, incredible. His evidence that he confirmed all of the substance to be of the same type, and that it is cannabis. His evidence was not shaken in cross-examination. In the absence of any evidence to the contrary, I would accept his evidence that 100% of the plant material from the slab was examined, and that from visual examination he found it to be cannabis and not any other plant material, and that that finding was confirmed by chemical testing that he performed. In other words, his evidence that he found the plant material to be 335.1gm of cannabis, remains unshaken and is, for the purposes of s. 180 of the Code, accepted.

The Trafficker

While the evidence of trafficking is clear enough, the important question is who is trafficking. Specifically, in this case, the question is whether the prosecution has in terms of s. 180 of the Criminal Procedure Code made out a *prima facie* case that the accused is the trafficker of these dangerous drugs as set out in the two charges.

The prosecution relied upon the evidence of SP8 who rented out the room to the accused. According to SP8, the accused rented the room alone and had done so for the period of two years prior to the incident. According to SP7, SP9 and SP5 the keys to the house 2-1B and the room in which the drugs were found were taken from the inner waist pocket of the accused when he was searched in house 2-1F. The accused had then led them to House 2-1B and room B1 therein.

On the evidence of SP8, the term of his rental of the premises by the accused is that he rents singly. For that he paid originally RM180 per month, which was later increased to RM200 per month. It would be wrong to conclude, in the absence of evidence of a breach of the terms of the agreement, that the room was also occupied by others. It would be contrary to public policy to assume in the absence of evidence that there was a breach of a lawful term of agreement. Accepting then at this stage that the tenancy agreement was complied with, it must be concluded that the accused has sufficient exclusivity of care or management of the room B1 as to be the sole occupier thereof, and in possession of all of the things found in the room.

It is noted that the black bag containing the cannabis, and the newspaper wrapped package containing 22 small packets were apparently concealed. The prosecution relied upon s. 37(g) that:

> (g) if any dangerous drug is found to be concealed in any premises, it shall be presumed, until the contrary is proved, that the said drug is so concealed with the knowledge of the occupier of the premises;

The operative word in s. 37(g) is 'concealed'.

The compressed slab of plant material confirmed by the chemist to be 335.1 gm. cannabis, and subject of the second charge, was in a black bag branded 'LICIANO' and is placed behind a television set near the corner of the room. D/Sjn. Mohd. Zaman (SP9) who found the bag, after making the location on the sketch plan exh. P6 as a circled "N" in red ink while giving evidence, said:

> ... Ianya terletak di lantai dibelakang TV. Jika berdiri dari tempat bertanda 'X (dalam bulatan)', tak boleh nampak beg hitam itu.

The 22 small packets of substance containing heroin and monoacetylmorphines were wrapped in a piece of newspaper was found behind a mattress leaning against the wall.

Placed in such manner, are these things 'concealed'? More importantly, are they concealed within the meaning of s. 37(g)?

The word 'concealed' includes in its meaning, not only 'hidden', but also, obscured, covered, not evident, secreted, camouflaged, even disguised, so as not to be apparent to others. It cannot be said, in terms of the common usage of the term, that things kept in a safe is 'concealed' unless the safe itself is concealed. Therefore if the thing is kept in a normal place or normal place of storage, it cannot be said to be concealed since normal places of storage are apparent to everyone.

Considering that the effect of finding that the 22 packets and the slab of cannabis are concealed is to place a burden on the accused of disproving on a higher standard, ie a balance of probabilities rather than the normal burden of raising a reasonable doubt, the elements raising the presumptions must be proved strictly before the presumption may arise. The higher standard to disprove knowledge that is imposed by s. 37(g) upon the occupier reflects that the concealment is done by a person who has knowledge why he wants to hide it. It must be concealment such as would suggest that it can only be done by a person who is at least an occupier.

If the 22 packets were merely wrapped up, or the slab was kept in a bag, it is clear it cannot be said they are concealed as to give rise to the presumption under s. 37(g). But not only were the 22 packets of substance suspected to be heroin and the compressed slab of cannabis wrapped up or placed in a bag, but were placed behind a mattress leaning against the wall and a television set respectively. There is an element beyond packaging and normal storage as to conceal.

In this case, the manner these items were placed, even if it were to be regarded as some effort at concealment, is concealment very easily effected by any person having even a brief visit. Any person could in a very short time upon entry place a package or a bag behind a mattress against a wall or a television set. It is not such concealment as could only be effected by an occupier as to warrant visiting the presumption of s. 37(g) upon him. Further, a mattress is something used every night. For use it has to be taken and put on the floor, when the newspaper wrapped 22 packets would become apparent. Even with the black bag containing the compressed slab of cannabis. D/Sjn. Mohd. Zaman when asked answered carefully "Jika berdiri dari tempat bertanda 'X (dalam bulatan)', tak boleh nampak beg hitam itu." He did not say it was concealed from all parts of the room. Would someone sitting watching the television be able to see it from under the television set? These gaps were left open. One can only conclude that while the items were kept from view, they are not necessarily so hidden or concealed for the presumption under s. 37(g) to arise against the occupier.

There is no apparent concealment of the five packets in the pink plastic bag found in the middle of the room. It cannot be said to be concealed. Where the presumption under s. 37(g) does not arise, does it mean that the occupier cannot have knowledge of the dangerous drugs? It ought to be remembered that s. 37(g) was introduced to impute knowledge upon the occupier for things that are concealed in the premises. Being concealed, it was difficult to prove that the occupier knew of the presence of the dangerous drug, let alone knowledge of it. The presumption against the occupier may be justified on the grounds that only the occupier could have concealed the items. But this does not mean that where the presumption under s. 37(g) does not operate, such as when the items are not concealed, the occupier does not have knowledge. In such circumstances, knowledge, as always, is provable by surrounding facts.

I turn for the moment to consider other related submissions made.

The Other Submissions

Mr. Karpal Singh submitted that the prosecution has failed to prove that the accused had exclusive possession of Room B1 in House 2-1B, and specifically, the prosecution had failed to adduce evidence to exclude the possibility. In support of this argument Mr. Karpal Singh cited *Abdullah Zawawi bin Yusoff v. PP* [1993] 4 CLJ 1; [1993] 3 MLJ 1 SC. That case is often cited for the proposition in headnote (3), as follows:

> Given the fact that this was a case where the police were acting on a tip-off, the onus was not on the defence to prove the possibility of access by others but on the prosecution to exclude such possibility.

With respect, that is putting on too strong a colour to the actual decision if this passage is read in isolation. The actual words of Edgar Joseph Jr (SCJ) as he then was were:

> With respect, given the fact that this was a case where the police were acting on a tip-off, undoubtedly by an informer, who might have been a paid informer, and the further fact the house was still under construction, the onus was not on the defence to prove possibility of access by others, but on the prosecution to exclude such possibility. ... (page 7D)

In that case there was also evidence that another person, Mohammad bin Mohd Amin had liberal access to the house. Indeed when the police raided the house, they had found this person sitting in the lounge near a wall smoking 'rokok daun'. The appellant in that case lived in the house with his wife. Edgar Joseph Jr SCJ (as he then was) said:

> Another distinct possibility – not considered by the judge – was that the informer, upon whose tip-off the raid on the appellant's house had been conducted, might have planted the drugs in the box. This does not seem to us a fanciful possibility, bearing in mind that the house was still under construction and unfenced at the material time, and both the appellant and his wife were engaged in trade which took them out of doors; he as a carpenter engaged in building a house at Kampong Lembaga for one To' Haji Omar and she as a coffee stall holder at Gua Musang from 6 in the morning until 12 noon and again from 2.30 in the afternoon until 10 at night. (page 8H-9A).

In that case, on the facts, the evidence adduced by the prosecution a) did not just leave open the possibility of access by others, which may in the absence of any evidence others did come to the house might be termed a fanciful possibility, but also b) showed actual access by one Mohammad bin Mohd. Amin and persons involved in construction, and the learned judge found:

> Having examined the evidence led by the prosecution afresh, we found that the evidence left too many questions unanswered with the result that the proverbial cap might well fitted the head of the appellant but that of others as well. (p. 9H)

Mr. Gobind Singh submitted that the finding of the keys in the waist pocket of the accused is not sufficient to show he has exclusive possession of the room for the purpose of s. 37(b) of the Dangerous Drugs Act 1952.

In *PP v. Chong Wei Kian* [1990] 2 CLJ 435; [1990] 3 MLJ 165 which was cited in support, the prosecution relied on the fact the accused informed them where he lived, using a set of keys from the accused's pocket they entered the premises, and in the premises they found not only the heroin but also a passport and bank account book in the name of the accused. In my opinion *PP v. Chong Wei Kian* and *Abdullah Zawawi bin Yusoff v. PP* may be distinguished on facts. In the case before me, the keys were taken from the accused's pocket, he led the police to House 2-1B located two floors below, there was neither evidence indicating nor assertion made in cross-examination that other persons have access to the room, and importantly, there is the evidence of Lee See Moy (SP8) that the accused rented the room B1 alone. In the circumstances I find that the prosecution has made out a *prima facie* case that the accused is the exclusive occupier of the room. To hold there is a doubt raised in that the television set and mattress and perhaps other things in the room B1 may belong to other persons, that these things had not been confiscated, investigated and produced in court would lead us into the realm of fanciful and shadows of doubt of which Denning J had warned while explaining the term 'beyond reasonable doubt' in *Miller v. Minister of Pensions* [1947] 2 All ER 372, 373 referred to earlier above.

Thus also in *Abdullah Zawawi bin Yusoff v. PP*, there was reasonable doubt because there was evidence that another person had liberal access to the house, and therefore it was probable he may have something to do with the drugs found.

Needless to say question of access to the room merits anxious consideration. C/Insp. Kamaruddin (SP7) had said that he had taken both padlocks from the grille and the door to Room B1. C/Insp. Kamaruddin (SP7), Insp. Wan Roslan (SP3) and D/Kpl Manickam a/l Subramaniam (SP1) had gone to House 2-1B on 6 September 1997 at about 4.40pm but could not enter because the door was locked. Insp. Wan Roslan (SP3) went again on 14 September 1997 at about 2.20pm but again could not enter because the grille door was locked with a padlock. Insp. Wan Roslan (SP3) returned on 15 September 1997 at about 4.45pm and found the grille door padlocked. He instructed D/Kpl Kanasamurthi to cut the padlock to enter House 2-1B.

Lee See Moy (SP8), who rented the room B1 to the accused, gave evidence that she was called some days after the arrest of the accused by a neighbour. She went there to 2-1B to replace the grille padlock which had been cut. Lee See Moy had also said in her testimony that the lock to the door to Room B1 is self-locking when the door is closed. C/Insp. Kamaruddin (SP7) however said they opened a padlock and he took away the padlock.

It was submitted for the accused that there is the possibility that there is a third person who has access, particularly since there must have been an informer in this case.

In considering the likelihood of another person having access to room B1 in House 2-1B, I have reviewed the notes of evidence carefully. I find there was no suggestion by C/Insp. Kamaruddin (SP7) that they had raided House 2-1B on information by any informer. Indeed there was no similar suggestion in respect of the raid of House 2-1F, which was in fact the target of the original raid. There is nothing in the prosecution evidence suggesting an informer in respect of Room B1 in House 2-1B. Nor was it put to the witness that Room B1 in House 2-1B was raided pursuant to the information of any informer.

The two other persons were arrested in House 2-1F. It cannot be said the prosecution has led evidence that they had access to Room B1 in House 2-1B. There was no suggestion in cross-examination of C/Insp. Kamaruddin (SP7), L/Kpl. Rameshwaran a/l Raju (SP5) or D/Sjn. Mohd. Zaman bin Yunus (SP9) that these two other persons were ever at any time in House 2-1B. It is clear the police party was led to House 2-1B only by the accused.

Inspection of the photograph exh. P3A shows a padlock could be used on the door as the necessary fixture can be seen on the door and door-post. The evidence of C/Insp. Kamaruddin (SP7) is therefore not inherently incredible. That the room B1 may be locked with a padlock is not incredible. It is supported by the evidence of D/Sjn. Mohd. Zaman bin Yunus (SP9) and. It was not put to either of these witnesses that a second key was necessary to open the door to room B1 in addition to the key to the padlock.

The subsequent difficulty encountered by Insp. Wan Roslan (SP3) to enter House 2-1B related to the grille door which was padlocked. Once the grille padlock was cut, there was no difficulty to enter room B1. At no stage was it suggested by the prosecution witnesses on the subsequent entry that any unlocking was necessary. Neither was it put to any of these witnesses in cross-examination that any key was needed to enter the room B1.

Nowhere in the cross-examination of Insp. Wan Roslan bin Wan Ab. Rahman (SP3), C/Insp. Kamaruddin (SP7), D/Sjn. Mohd. Zaman bin Yunus (SP9) or L/Kpl Manickam a/l Kandasamy (SP1) was it put to the witnesses that the door of Room B1 was locked not only by a padlock, but also by an automatic lock, and that therefore two keys were necessary to open that door. If it were part of the defence case, no doubt the question would have been put to these witnesses by counsel. I must conclude it was not originally part of the defence, and that the question only emerges in submissions simply because of an arguable omission on the part of the prosecutor rather than any inherent doubt or weakness in the evidence.

The mystery, if any, is the padlock that was cut. Who put it there? In fact Lee See Moy (SP8) was not asked if she put a new padlock. But it is clear when she found the padlock was cut, she put in a new padlock. Lee See Moy (SP8) had given her evidence in very clear and direct terms to questions put to her and I have every confidence in her veracity. It is certain in my mind that rather than leave the grille door to House 2-1B unlocked after the original padlock was taken away by the police, she had installed another padlock, as she did without complaint or question when the police cut the padlock. She has every reason to keep House 2-1B locked. If someone else had put in a new padlock after the original padlock to the grille door was taken away by the police, Lee See Moy (SP8) would have difficulty entering the House 2-1B. She had given unchallenged evidence she comes in about once a week to look after the house, though not the rooms. She was not challenged in cross-examination that she had such difficulty. As to other items in the room, there is in evidence only the television set and the mattress. At the stage of the prosecution case, there is no evidence brought forth of other things in the room B1, whether in examination-in-chief or cross-examination. Nor was Lee See Moy (SP8) cross-examined if she had removed the items from room B1. At the end of the day, the room B1 and house 2-1B not being padlocked after the police took away the padlocks, subsequent entry to remove the television set, mattress and any other things that might be in the room could be by anyone, and does not affect the fact that before the police raid and arrest of the accused, the latter was the single tenant of room 1B and held the keys to the padlocks to House 2-1B and room B1. In the circumstances the possibility of another person having access, while it is always possible in the case of any place of abode, on the facts before the court at the prosecution stage, is not in the least probable.

C/Insp. Kamaruddin bin Ismail (SP7) and Insp. Wan Roslan bin Wan Ab. Rahman (SP3) as did Supt. Ismail bin Abdul Rahman (SP4) had given evidence that the powdery and granular substance in the five packets in the pink plastic bag, and the 22 small packets found wrapped in two bundles in

a piece of newspaper, were pink in colour. The chemist, Cheong Meow Kioon (SP6) described the colour of the powdery and granular substance in the 22 small packets as 'light orange'. This raises the likelihood the 22 small packets may not be the same.

The colours of the exhibits as produced before the court are in fact different shades of pink. The substance in the five packets are a solid pink colour. The substance from the 22 small packets have an orangey tinge, and from my inspection, it can also fairly be described as pink. It is a pink colour with an orangey tinge. Since the plastic bag in which the five packets of pink substance was found was also described as pink, and no objection was taken although the shade of pink is different from the aforementioned two; and clearly the witness SP7 and SP3 had not had occasion or purpose to actually compare the colours, I do not consider there to be any material discrepancy as to the exhibit. All these witnesses were in agreement that the packages and contents that they saw were as shown in the photograph P4 taken by D/Kpl Abdul Latif bin Ismail (SP2) at the request of Insp. Wan Roslan bin Wan Ab. Rahman (SP3).

The sealer exh. P10 was produced through Insp. Wan Roslan bin Wan Ab. Rahman (SP3), the Investigating Officer, was the sealer he had received on 4 September 1997 from C/Insp. Kamaruddin bin Ismail (SP7). The latter denied exh. P10 was the sealer he had taken from House 2-1B on 3 September 1997 and handed over to Insp. Wan Roslan bin Wan Ab. Rahman (SP3). After a lunch break, the DPP produced another sealer marked King Star (P34) with the signature and date of C/Insp. Kamaruddin (SP7) as being the sealer concerned. Clearly it shows that exh. P10 was the wrong exhibit.

Clearly Insp. Wan Roslan bin Wan Ab. Rahman (SP3) did not produce the correct exhibit. When recalled, he explained that exh. P10 was his personal sealer which he has placed in the same locked cabinet with Exhibit P34. As an excuse it is inept, since it makes his testimony in producing Exhibit P10 even more reproachable as he must have realized at the time he gave that evidence it was the wrong exhibit. He could not have mistaken his personal sealer. His evidence is only saved from being totally rejected by the fact he had before producing exh. P10 described the sealer as King Star. Nevertheless Insp. Wan Roslan (SP3) must stand censured and his evidence must in the circumstances be taken with caution. Nevertheless, P34 being also identified by C/Insp. Kamaruddin (SP7), I accept P34 as the sealer taken from Room B1 in House 2-1B.

Considering that a) the accused is the sole occupier of the room; which b) from the photographs and sketch plan and evidence unchallenged in this particular respect by cross-examination, is obviously of uncomplicated design and sparsely furnished; c) with few possessions therein, the accused cannot not know of the things in his room. The items in the middle of the room include not only ordinary weighing scale but also an electronic digital weighing scale for weighing of small quantities, together with the paraphernalia for repackaging small amounts in small plastic packets, electric sealer for the plastic packets. While plastic packets and kitchen weighing scales may be innocuous in a household, an electronic digital weighing scale is for accurate weighing as necessary. The small 5cm by 3cm plastic packets show that the electronic scale is to weigh small amounts to be put into the small packets. An electric sealer is for business-like sealing of plastic packets. The five larger packets of pink powdery and granular substance found about a foot away from the weighing scales, sealer and plastic packets can only reasonably mean those contents are to be re-packed into the small packets. The 22 sealed small packets of similar substance although of a slightly different shade of pink suggests the use of the small packets found in the room B1. The pink powdery and granular substance is not a form or colour usually found in households such as sugar, flour, soap or detergent, cosmetic or medicinal mixed granules and powders as to be mistaken for these household items. The pink powdery and granular colour and form is commonly associated with illegal heroin.

In my considered opinion, the said dangerous drugs cannot be said to be concealed. The occupier must clearly have knowledge of that which is in the room of which he has sufficient exclusivity of occupation, and that he knows the newspaper wrapped package, the pink plastic bag and the black bag dangerous drugs. Certainly it is most odd that if the dangerous drugs were concealed in the room he would be deemed to have knowledge unless the contrary is proved, but is held cannot to have knowledge when it is not concealed. Knowledge must be a conclusion, as it must always be except in the case of a voluntary admission or confession, arrived at from a consideration of all of the facts of the case.

In the absence of any evidence of access to the said premises by any other person, the evidence irresistibly suggests, without relying on any presumption, that the accused brought the items to the room B1 but that also he has custody, control, knowledge and therefore possession of the dangerous drugs found in the room, and which he was re-packing in small quantities for giving or sale to other persons. Alternatively, the physical evidence irresistibly leads to the conclusion likewise that he has knowledge of the dangerous drugs and its nature, and the presumption under s. 37(da)(iiia) for heroin and monoacetylmorphines, and s. 37(da)(vi) for cannabis respectively, applies such that the accused is presumed, unless he proves to the contrary, to be trafficking in the said dangerous drugs.

Considering the prosecution case as a whole, I find that the prosecution has made out, beyond reasonable doubt, a *prima facie* case under s. 180(i) of the Criminal Procedure Code, and in terms of s. 180(iii) of the Code, I had called upon the accused to enter upon his defence.

The Defence Evidence

The accused elected to give an unsworn statement from the dock. This is what he said:

> Pada 3 September 1997 ada beberapa orang datang keatas. Pada hari itu beberapa orang datang mencari sesuatu dibilik saya. Seorang daripada mereka mengambil kunci dari poket saya. Saya tidak buat apa-apa. Saya tidak bergelut.
>
> Selepas itu mereka membawa saya kebawah. Mereka mengambil kunci dan membuka pintu bilik. Semasa membuka pintu saya berada dibawah.
>
> Lepas itu mereka membawa barang-barang tidak tahu dari mana.
>
> Bilik saya ada kawan-kawan saya selalu datang. Ada masa kawan-kawan minta kunci bilik daripada saya. Ada masa kawan-kawan saya membawa perempuan ke bilik. Ada masa saya tidak tinggal dibilik itu, kawan-kawan saya membawa perempuan kebilik saya.
>
> Barang-barang dadah itu bukan saya punya. Saya bukan penagih dadah.
>
> Itu sahaja.
>
> Mereka mengambil kunci semasa saya diatas. Dan membawa saya kebawah. Saya di tingkat satu semasa mereka buka pintu bilik. Mereka membuka sendiri dan saya dibelakang.

Considering his testimony in the light of all of the evidence adduced before this court as at the conclusion of the trial, it is clear the accused himself confirmed the prosecution evidence that he was arrested upstairs. I take it, from the context, he means he was arrested in Rumah 2-1F. He acknowledged that the keys were taken from his pocket. He did not struggle. He says he was brought downstairs where the police, using the keys from his pocket, opened the door to the room B1.

Significantly, there is no suggestion by the accused himself there were more than two keys necessary to open the grille and the door to his room. It was not suggested in the prosecution evidence that he struggled or fought, but merely that he sought to resist, resulting in the pocket material being torn out. The hard evidence supports the prosecution's case that there was no voluntary cooperation, since in the process the pocket was torn out. Whether the resistance was in the nature or course of a fight, struggle, or jerk in surprise is not essential to my present consideration. Without any evidence giving any

sense of time, positions of the persons and witnesses involved, the circumstances do not allow making any safe finding whether there was a struggle or merely reaction of surprise to the action of L/Kpl. Rameshwaran (SP5), as to enable any conclusion that he might want to hide the fact the keys were on this person. I would there not make any specific finding that there was a struggle or to draw any conclusions from it.

The accused explained he was behind the police as the latter opened the door to his room B1. Three essential aspects of his statement are:

1. That the police brought the exhibits form some other place he does not know.

This assertion was made only when the accused gave evidence. It was never put to prosecution witnesses, nor is it submitted by counsel, that the police had planted the drugs upon the accused, as the accused now suggests. Nothing was suggested in cross-examination that the drugs and other paraphernalia of trafficking were not found in the room. In the circumstances that this suggestion had not been laid out to the relevant witnesses, but brought up only in his statement, it suggests it is an afterthought or a recent concoction after the close of the prosecution case and cannot possibly be true. Even if there is nothing to prevent the police from planting evidence, and even assuming it is possible the police might plant evidence, the failure to assert the possibility when opportunity exists to do so in cross-examination, and in the absence of any suggestion why the police might want to do so, must keep this suggestion in the realms of fancy, so improbable that not only it cannot be believed, but cannot and does not raise any reasonable doubt. It falls squarely within the description of Denning J in *Miller v. Minister of Pensions*, that while of course it is possible, but it is not, given the evidence in this case, in the least probable. As such it cannot be a reasonable doubt.

2. The exhibits do not belong to him and he is not a drug addict.

There was no evidence he was a drug addict. His assertion he is not a drug addict must therefore be accepted. The present assertion the exhibits do not belong to him is in my view of little moment since ownership is not an element either in possession or trafficking. That he is not a drug addict dispels any lingering shadow of doubt that he might have been an addict with considerable resources and appetite for such quantity of dangerous drugs found in the room B1.

3. That his friends often come to his room, that they borrow the room key from him when he is not staying in the room, so as to use the room. They bring women to the room.

The evidence put forth by the accused is that his friends often come to visit and that they borrow the room key to use the room to bring women to. There is, however, no assertion that these friends are drug users or traffickers such that the drugs might probably belong to them. There was no assertion indeed by the accused that the drugs belonged to his friends. The sole stated purpose of the use of the room by his friends is to bring women too. In other words, his own testimony, other than in the aspects I have just dealt with and rejected above, fails to suggest that his friends might have been the owners, possessors or traffickers of the drugs. There is no suggestion whatsoever that his friends were in such an immediately recent or recent time in possession of the room B1 that the dangerous drugs found could have belonged to them. The defence not having been laid out from the earliest available opportunity, and in the defence case, only expressed in the most general terms that does not actually implicate other persons, cannot possibly be true, and though possible, is not considering the circumstances of this case, in the least probable as to raise a reasonable doubt.

No other evidence being advanced, the prosecution evidence in respect of the other elements of the charge remain challenged only in submissions but not by any evidence after the defence has been called. In this regard it must always be borne in mind that questions put in cross-examination of witnesses merely serve to lay out or give notice of the lines of defence. But questions in cross-examination themselves do not constitute evidence. What is therefore put to the witness can only gain credence for consideration only if, when the defence is called, evidence is led along the lines laid out in the cross-examination. If not followed up by leading evidence at the defence stage of the trial, then whatever has been put becomes of little moment as evidence, and may contribute even less to any submission made.

The Chemist's Evidence

I have also reviewed the chemist's evidence with particular attention in the light of *Leong Bon Huat v. PP* [1993] 3 CLJ 603; [1993] 3 MLJ 11 FC and *PP v. Saad Mat Takraw & Anor* [1998] 3 CLJ 380 HC.

Firstly as to the cannabis. The quantity here is relatively small. There is no reason to believe that the evidence of the chemist that he examined visually 100% is inherently unbelievable or incredible. For the purpose of microscopic examination, the slab was broken into small pieces for visual examination. Although not separated into every leaf, bud and flower, and after having viewed the exhibit I am inclined to accept the Chemist's assertion it was sufficient to enable him to conduct his visual examination with a microscope, and able to satisfy himself that all of the material belong to the same plant material.

The chemist said that from his experience, and after the visual and microscopic physical examination, he found the plant material to be cannabis. I have accepted that part of the evidence as proof on a balance of probabilities, following *Leong Bon Huat v. PP* that it is cannabis. He had then conducted a gas chromatography test of the resin which confirmed it contained the active ingredients of cannabis – ie cannabinoids. The chemical test is confirmatory that it is cannabis.

The issue raised is whether he had used an adequate sample in order to do so. This issue is raised in the light of the decision of *Leong Bon Huat v. PP* [1993] 3 MLJ 11 SC which has often been argued to have decided that a) that the physical examination comprising visual and microscopic examination is proof only on a balance of probabilities and b) at least 10% of the total quantity must be used for the chemical tests in order to prove beyond reasonable doubt. Brief as it may be *Leong Bon Huat v. PP* should be read with care. Edgar Joseph Jr SCJ (as he then was) said:

> Explaining how he arrived at this conclusion he said this:
>
> > I conducted a visual examination of the contents of 'E1' and then I took samples of the content of dried plant matter. I examined the samples using chemical methods and also conducted microscopic examination. I took samples from various positions of each layer of the dried plant matter and I examined and analysed such samples individually.

Leong Bon Huat v. PP dealt with a case where the visual examination was as to 100% of the plant material but the microscopic and chemical analysis was in respect of an unknown quantity of sample of 'over 10%'. That the Supreme Court did not intend to pronounce finally on the question of what is an adequate quantity was stated:

> ... What would be adequate quantities for this purpose would depend upon the particular circumstances of each case and we do not consider any useful purpose would be served by laying down any mathematical formula. ...

The Supreme Court in *Leong Bon Huat v. PP* properly left open the question of adequate sampling to the particular circumstances of each case.

In this case not only the visual, but also microscopic examination was conducted upon 100% of the original plant material. Given the quantity of 335.1 gm, it was not impossible or incredible to have conducted a 100% visual and 100% microscopic examination of the plant material. Having looked at the plant material, and notwithstanding not every bit of the plant material was separated, I note particularly that the plant material has been broken into sufficiently small quantities as to enable the chemist to make his findings. I am therefore satisfied that the chemist was able to examine all 100% of the plant material.

That 100% examination of the plant material confirmed that it was all of the same material. The chemist, given his experience, identified from the physical examination that the plant material was cannabis. The chemist made conclusions that a) it was all the same plant material, and b) that it was cannabis. The chemist was careful to make this distinction.

In *Leong Bon Huat v. PP* the Supreme Court held, as regards visual examination:

> It is true that the chemist did say that he had conducted a physical examination of the whole of the plant material, by which, we suppose, he meant a visual examination, aided no doubt by a microscope. But while the result of such an examination might well establish, on the balance of probabilities, that the plant material was cannabis within the meaning of s. 2 of the Act it was necessary to take the matter further and establish beyond any reasonable doubt that that was so. This further step would, of necessity have involved the carrying out of chemical tests on adequate quantities of the plant material. What would be adequate quantities for this purpose would depend on the particular circumstances of each case and we do not consider that any useful purpose would be served by laying down any mathematical formula. Suffice it to say, that in the present case, we were not satisfied that the samples of plant material upon which the chemist had carried out the chemical tests were adequate, having regard to the total weight of the plant material, for the reasons stated.

The evidence in *Leong Bon Huat v. PP* was that the microscopic examination was conducted on samples, and in my opinion the Supreme Court had carefully used the words 'aided no doubt by a microscope' in reference to the microscopic examination being limited to the samples. The reasoning of the Supreme Court then was that plant material if examined 100% visually, even though aided by microscopic examination but of samples only, was insufficient to ensure that the samples used was sufficiently representative of the original plant material such that the findings of the chemical test can properly be said to reflect the original plant material. Even if accepted, the visual examination was insufficient to prove beyond reasonable doubt it was cannabis.

The factual situation in this case differs from *Leong Bon Huat v. PP* in that the microscopic examination was conducted on 100% of the plant material, and not on an unknown quantity of sample. To the extent that the chemist's evidence is to the effect all of the plant material was the same after 100% visual and 100% microscopic examination, such evidence is as reliable as any evidence any reliable witness can give. As to his opinion that it is cannabis after such visual examination, notwithstanding his experience with cannabis, such evidence would require in the case of a chemist, a further step of confirmatory chemical testing to establish beyond reasonable doubt that it is cannabis. It may well be different if the person giving the evidence is a botanist who specialises in the identification of plants.

In other words, there is a gulf of difference between a) where 100% of the material is examined visually and microscopically, and then small quantities are taken for the needs of the chemical test and b) where samples are taken from the original bulk and it is the samples that are then examined physically and from which quantities are again taken as needed for the chemical testing. In the latter case, it is essential to ensure, be it by 'adequate quantity' or other scientifically accepted method, that the sample is reasonably representative of the original bulk such that it could fairly be said that the results from the samples represent and apply to the whole of the original plant material. It would be to go too far to require that 100% of the plant material must be consumed in chemical testing to prove it is all cannabis. It would be equally unreasonable and irrational to say that there is only proof beyond reasonable doubt only in respect of the quantity consumed in chemical testing.

Secondly as to the chemistry analysis for monoacetylmorphine and heroin: tests were conducted samples from the five large packet and combined from 22 small packets. The chemist had given evidence it was homogenized. He explained that from previous testing on the type of equipment used, it was found that five minutes of blending was sufficient to homogenize the substance. In this case it was blended for six minutes. I have reminded myself of the Singapore case of *PP v. Ang Soon Huat* [1991] 1 MLJ 1, which was followed in *Leong Bon Huat v. PP*. However a careful reading of that case discloses that although the prosecution evidence was that the substance was blended three times for five minutes each time, the defence did in fact lead evidence challenging the assertion of homogeneity.

In this case no evidence was led by the defence to challenge the evidence of the chemist. Although challenged in cross-examination, it was not followed up when defence was called. His testimony was unshaken by the cross-examination. He has answered clearly and unhesitatingly. I am reminded of the words of Azmi SCJ in *Munusamy v. PP* [1987] 1 MLJ 492 FC:

> We are therefore of the view, that in this type of cases where the opinion of the chemist is confined only to the elementary nature and identity of substance, the court is entitled to accept the opinion of the expert on its face value, unless it is inherently incredible or the defence calls evidence in rebuttal by another expert to contradict the opinion. So long as some credible evidence is given by the chemist to support his opinion, there is no necessity for him to go into details of what he did in the laboratory, step by step.

Notwithstanding the challenge to the chemist's evidence, no evidence was called by the accused to support the line pursued by submissions that the analysis by the chemist was in anyway was defective or inadequate to determine the weight and identity of heroin and mono-acetylmorphines and cannabis respectively beyond reasonable doubt. While of course it is possible

that the substance may not have been homogenized, or that a chemist may not have been able to examine every particle of the plant material, I do not find it in the least probable because a) the quantities in this case is not large as to make the evidence that he has done so incredible, b) the evidence of the chemist remained unshaken at all times, and c) no further evidence was led so as to suggest the methodology adopted by the chemist was defective or inadequate.

Conclusion

I have written this judgment such that the consideration of a) whether the prosecution has made out a *prima facie* case and b) whether at the end of the trial the prosecution has proved its case beyond reasonable doubt, are clearly identifiable. However, having held that that the standard of proof to be applied for the purposes of s. 180 of the Code is proof beyond reasonable doubt, it is unnecessary for me to re-write or reproduce all of the matters I had already considered therein, for the purposes of this final part of the judgment. It suffices to say that I have considered all of it again as part of my judgment under s. 182A of the Code. I find no reason, in the light of the evidence adduced by the accused, to change my conclusions as to the evidence of the prosecution witnesses.

In conclusion, the accused having elected to give evidence alone and from the dock, I cannot take the prosecution to task for not putting to the defence the essential parts of the prosecution case, including in particular, questions as to the third lock on the door of room B1 in House 2-1B, whether the two other persons arrested in House 2-1F usually come to room B1 of House 2-1F. Given the fact the evidence given by the accused is confined to asserting that others have access to the room, that the drugs do not belong to him and that he does not know where the drugs came from, I find for the reasons I have given earlier, upon a consideration of all of the evidence adduced in this case, that the prosecution has proved its case beyond reasonable doubt. Accordingly I find the accused guilty as charged under both charges, and invite counsel to place before the court any plea of mitigation if the accused so desires.

Conviction And Sentencing

Nothing in what has been advanced in mitigation allows the court, after having found you guilty as charged under both charges, to consider not to convict you. Accordingly the court convicts you on both charges under s. 39B of the Dangerous Drugs Act punishable under s. 39B(2) of trafficking in 52.29 gm of heroin and 51.87gm of mono-acetylmorphines, and 335.1 gm of cannabis respectively. It is provided by the sub-section that any person who is guilty

of trafficking under s. 39B(1) is guilty of an offence under the Dangerous Drugs Act, and upon conviction shall be punished with death. The court sentences you to death in respect of each of the charges. In accordance with s. 277 of the Criminal Procedure Code, I direct that you shall be hanged by the neck until you are dead.